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In the Supreme Court of the United States

OCTOBER TERM, 1997

ROBERT E. RUBIN, SECRETARY OF THE TREASURY, AND LEWIS C. MERLETTI, DIRECTOR OF THE UNITED STATES SECRET SERVICE, PETITIONERS

v.

UNITED STATES OF AMERICA, ACTING THROUGH THE INDEPENDENT COUNSEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under Rule 501 of the Federal Rules of Evidence, a protective function privilege should be recognized in response to grand jury subpoenas for the testimony of Secret Service officers concerning information they learned while in proximity to the President of the United States for the purpose of protecting him.

PARTIES TO THE PROCEEDING

The United States, acting through the Secretary of the Treasury and the Director of the Secret Service in their official capacities, has invoked the testimonial privilege at issue here. The Independent Counsel, who is empowered to exercise specific prosecutorial functions on behalf of the United States, has challenged the existence of the privilege. To avoid confusion and unnecessary debate in naming the parties, we identify petitioners as Robert E. Rubin, Secretary of the Treasury, and Lewis C. Merletti, Director of the Secret Service, in their official capacities. We identify respondent as the United States acting through the Independent Counsel.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Secretary of the Treasury and the Director of the Secret Service, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) and the memorandum opinion and order of the district court (Pet. App. 15a-27a) are not yet reported. The orders of the court on petition for rehearing and

suggestion for rehearing en banc (Pet. App. 28a-36a) are not yet reported. Portions of the district court's opinion and the record remain under seal.[1]

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1998, and a petition for rehearing was denied on July 16, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Article II, Section 1 of the Constitution provides:

The executive Power shall be vested in a President of the United States of America.

Title 18, Section 3056 of the United States Code provides:

(a) Under the direction of the Secretary of the Treasury, the United States Secret Service is authorized to protect the following persons:

(1) The President, the Vice-President (or other officer next in the order of succession to the Office of the President), the President-elect, and the Vice-President-elect.

* * * * *

The protection authorized in paragraphs (2) through (7) may be declined.

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[1] We have reproduced in the appendix redacted versions of the district court opinion and order. The unredacted versions are reproduced in the sealed appendix to respondent's petition for a writ of certiorari before judgment in the court of appeals. See *United States* v. *Rubin*, No. 97-1942 (cert. denied without prejudice June 4, 1998).

Rule 501 of the Federal Rules of Evidence provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. * * *

STATEMENT

This case presents an issue of extraordinary national importance. The United States, through the Independent Counsel, has moved the United States District Court for the District of Columbia to compel Secret Service personnel to testify before a grand jury about information that they, or other Secret Service personnel, learned while protecting the President of the United States. The Secretary of the Treasury, on behalf of the United States, has formally asserted the protective function privilege based on the professional judgment of the Secret Service that, if the courts refuse to recognize the privilege, the destruction of the relationship of confidence and trust between a President and his protectors would seriously impair the Service's future ability to protect those who serve as the Nation's Chief Executive. The district court refused to recognize any form of protective function privilege and granted petitioner's motion to compel. The court of appeals has affirmed the order granting the motion to compel.

1. Under the Constitution, the President is the sole repository of the "executive Power" of the United States, U.S. Const. Art. II, § 1. By virtue of the critically important Office that he holds, the President is subject to unique and mortal jeopardy—jeopardy that in turn threatens the Nation's democratic institutions and national security. The Nation has learned through the wrenching experience of four presidential assassinations that the Chief Executive's life is constantly at risk. Because threats to a sitting President's personal safety pose such grave national security concerns, Congress has provided for the Secret Service to protect the President and has directed the President to accept its protection. See 18 U.S.C. 3056(a). Congress's mandate entails an extraordinary and unremitting intrusion into the most intimate aspects of his life.

The Secret Service assumes full responsibility for protecting the President from every conceivable threat of attack. Pet. App. 41a, 45a-48a (Declaration of Lewis C. Merletti, Director, United States Secret Service ¶¶ 7, 14-17). By focusing all-encompassing attention on the President's security, the Service seeks to relieve the President of apprehensions about his own personal safety and to allow him to focus his attention on his official duties. See *id.* at 49a-50a, 52a (Merletti Decl. ¶¶ 18, 22). The Service has adopted a protocol for protection that places an absolute premium on continual and unquestioned physical proximity. *Id.* at 41a, 45a-47a, 49a-51a (Merletti Decl. ¶¶ 7, 15, 18-19). Under its "cover and evacuate" protective strategy, Secret Service personnel form a moving protective perimeter surrounding the President at all times, prepared to react instantaneously in the event of an attack. *Ibid.*; see also *id.* at 80a (Declaration of

Eljay B. Bowron, former Director, United States Secret Service ¶ 5); *id.* at 88a (Declaration of John W. Magaw, former Director, United States Secret Service ¶ 4).

The Secret Service's success depends critically upon the ability of its personnel to maintain constant close proximity to the President. As the current Director of the Secret Service has emphasized, tragedy can result when "as little as a few feet" separate the President from his protectors. Pet. App. 57a-58a (Merletti Decl. ¶ 28). Secret Service protective personnel must remain near on occasions of confidential and intimate conversation and, as a result, are at the President's side during top secret discussions, diplomatic exchanges, sensitive conversations, and matters of personal privacy. *Id.* at 51a-52a (Merletti Decl. ¶ 21). That level of proximity can be maintained only in an atmosphere of complete trust between the President and his protectors. *Id.* at 49a-50a, 55a-58a (Merletti Decl. ¶¶ 18, 27-28).

The relationship of trust that exists between the Secret Service and the President rests on the understanding that Secret Service personnel will keep absolutely confidential information they learn in the course of protecting him. Recognizing that confidentiality is essential to its mission, the Secret Service reported, as early as 1910, that "the men of this service detailed at the Presidential home in Washington or elsewhere are instructed not to talk of anything they may see or hear. So far as the actions of the President and his family and social and official callers are concerned the men are deaf, dumb and blind." Pet. App. 70a.

2. The Special Division of the United States Court of Appeals for the District of Columbia Circuit has

conferred jurisdiction on the Independent Counsel to investigate "whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law other than a Class B or C misdemeanor or infraction in dealing with witnesses, potential witnesses, attorneys, or others concerning the civil case *Jones* v. *Clinton*." Pet. App. 97a (Order, Division No. 94-1 (filed Jan. 16, 1998)). The Independent Counsel has represented that his investigation in this regard centers on whether the President had a sexual relationship with Lewinsky and attempted to conceal that relationship in proceedings arising from the since dismissed *Jones* v. *Clinton* lawsuit. See *Jones* v. *Clinton*, 990 F. Supp. 657 (E.D. Ark. 1998) (appeal pending in the 8th Circuit).

In the course of that investigation, the Independent Counsel has sought documents from the Secret Service, which has cooperated with respondent and provided all requested, non-privileged information. The Independent Counsel also has conducted numerous interviews and depositions of Secret Service protective personnel, including several Secret Service officers whose duties involve direct proximity to the President of the United States. Those persons declined, under a claim of privilege, to disclose information that they or other Secret Service personnel learned while in proximity to, and in the course of protecting, the President. In response, the Independent Counsel filed a motion to compel their testimony before the grand jury. Pet. App. 1a.

Acting through the Attorney General, the United States opposed the motion. The Secretary of the Treasury, who is vested by Act of Congress with responsibility for supervising the Secret Service, 18

U.S.C. 3056(a), submitted a declaration that formally invoked a protective function privilege against the disclosure of the requested testimony. Pet. App. 94a-95a (Declaration of Robert Rubin, Secretary of the Treasury). The Attorney General, who also has responsibility for protecting the President, see 28 U.S.C. 533(2), likewise determined that the compelling interest in protecting the safety of the President called for assertion of the privilege. See Opposition to the Independent Counsel's Motion to Compel at 32.

The Director of the Secret Service submitted a separate declaration describing the need for the privilege. Pet. App. 37a-60a (Merletti Decl.). The Director explained, with supporting exhibits, that the Secret Service's "cover and evacuate" protective strategy requires agents and officers to be near the President at all times and that close proximity of those personnel cannot be maintained without a relationship of absolute trust and confidence. *Id.* at 41a, 49a-55a (¶¶ , 18-25). The Director concluded, based on his responsibilities as Director and his extensive first-hand experience in protecting three Presidents, *id.* at 40a (¶ 5), that compelling Secret Service personnel to disclose information learned in the course of protecting the President would damage that relationship, thereby causing the President to distance himself from his protectors. The result would be to impair the Service's ability to protect the President—and the Nation—from the risk of a presidential assassination. *Id.* at 40a, 55a-60a (¶¶ 5, 26-30). The two most recent former Directors confirmed the assessment of Director Merletti. See *id.* at 78a-79a, 82a (Bowron Decl. ¶¶ 2, 9); *id.* at 86a-87a, 91a-92a (Magaw Decl. ¶¶ 2, 12, 14, 15).

Director Merletti explained that his judgment is borne out by the Nation's tragic experience with presidential assassination attempts. Pet. App. 41a-44a, 57a-58a (Merletti Decl. ¶¶ 8-12, 28). As the Warren Commission noted, "[a]ttempts have * * * been made on the lives of one of every five American Presidents. One of every nine Presidents has been killed." *Report of the President's Commission on the Assassination of President John F. Kennedy* 504 (1964). Since 1964, Presidents Ford, Reagan, and Clinton were the targets of domestic assassination attempts, and President Bush was the target of a foreign assassination attempt. The Director described how the proximity of Secret Service agents played a decisive role in protecting President Reagan from an assassination attempt and how greater proximity might have prevented the deaths of Presidents McKinley and Kennedy. Pet. App. 42a-44a (¶¶ 10-12).

The Department also submitted a letter from former President George Bush to the Director of the Secret Service, which explained that the prospect of Secret Service testimony affects "the confidence and trust that a President must have in the [Secret Service]." Pet. App. 62a (Merletti Decl. Exh. H, Letter from George Bush to Lewis Merletti, April 15, 1998). President Bush stated that "had I felt [the Secret Service] would be compelled to testify as to what they had seen or heard, no matter what the subject, I would not have felt comfortable having them close in." *Id.* at 63a.

3. The district court refused to recognize the protective function privilege and therefore granted respondent's motion to compel. Pet. App. 15a-27a. Citing this Court's decision in *Jaffee* v. *Redmond*, 518 U.S. 1 (1996), the district court acknowledged that

Rule 501 of the Federal Rules of Evidence provides that the privilege of a witness or government "shall be governed by the principles of the common law as they may be interpreted by the Courts of the United States in light of reason and experience." See Pet. App. 16a. The court nevertheless refused to allow the Secret Service to invoke its protective function as a basis for privilege, relying on three grounds. First, the court observed that neither Congress nor the federal courts had heretofore recognized such a right. *Id.* at 17a-21a. Second, the court noted that the States had not created an analogous privilege for state officials. *Id.* at 21a. Third, the court concluded—contrary to the professional judgment of the Secret Service and the considered opinion of a former President—that breaches of the traditional confidential relationship would not "lead a President to 'push away' his protectors" (*id.* at 23a). See *id.* at 22a-24a.

Petitioners filed a notice of appeal and a motion to expedite briefing in the court of appeals. In response, the Independent Counsel filed a petition for a writ of certiorari before judgment in the court of appeals. Petition for Writ of Certiorari in *United States* v. *Rubin*, No. 97-1942 (petition filed June 2, 1998). This court denied the petition for a writ of certiorari without prejudice, based on its expectation "that the Court of Appeals will proceed expeditiously to decide this case," *United States* v. *Rubin*, No. 97-1942, Order (June 4, 1998). The next day, the court of appeals entered an order setting an expedited briefing and oral argument schedule. See *United States* v. *Rubin*, No. 98-3069, Order (D.C. Cir. June 5, 1998).

4. The court of appeals heard argument and entered a per curiam decision affirming the district court's order compelling the testimony of the Secret

Service agents. The panel recognized that ensuring the physical safety of the President is "a public good of the utmost importance." Pet. App. 7a. The panel nevertheless concluded that the Secret Service had not shown "with the compelling clarity required by Rule 501 that failure to recognize the proposed privilege will jeopardize the ability of the Secret Service effectively to protect the President." *Ibid.* See *id.* at 10a-12a.

The court of appeals began its analysis by rejecting the argument, pressed by the Independent Counsel and accepted by the district court, that the protective function privilege is unavailable because of "the lack of relevant federal or state precedent" for the privilege. Pet. App. 6a. The court noted that "[t]he lack of such precedent is hardly surprising * * * in view of the novelty of the [Independent Counsel's] demand for testimony: This appears to be the first effort in U.S. history to compel testimony by agents guarding the President." *Ibid.* Given the unprecedented nature of the Independent Counsel's demands, the court concluded that judicial recognition of the privilege should depend on whether the Secret Service can "establish clearly and convincingly both the need for and the efficacy of the proposed privilege." *Ibid.*

The court concluded that the Secret Service had failed to carry its burden of showing that a protective function privilege "in its proposed form" would "materially enhance presidential security." Pet. App. 6a. The court stated that it "must listen with the utmost respect to the conclusions of those entrusted with responsibility for safeguarding the President," *id.* at 7a (quoting *A Quaker Action Group* v. *Hickel*, 421 F.2d 1111, 1117 (D.C. Cir. 1969)), but it was of the view that the Secret Service's concerns "are based in large

part on speculation—thoughtful speculation, but speculation nonetheless," *id.* at 8a (quoting *Swidler & Berlin* v. *United States*, No. 97-1192 (June 25, 1998), slip op. 11. The court acknowledged the sworn affidavits of the current and former Secret Service Directors, but concluded that it "must balance" that record evidence against the statements, outside the record, of two former Presidents on television talk shows. *Id.* at 8a. In addition, the court offered its own view that the President would allow agents to maintain close proximity in light of his own interest in his personal safety. *Id.* at 8a-9a.

The court also questioned the efficacy of a protective function privilege in light of the Secret Service's proposed exception for contemporaneously recognizable felonies, the Secret Service's expectation that its agents would honor the requirement of confidentiality without signing confidentiality agreements, and the possibility that the Secretary of the Treasury could waive the privilege. Pet. App. 9a-10a. The panel also expressed doubts about the need for a privilege when the President is within the White House. *Id.* at 11a. Finally, the panel concluded that the general policy underlying 28 U.S.C. 535(b), which requires heads of departments to report evidence of criminal misconduct to the Attorney General, "weighs against judicial recognition of the privilege proposed here." Pet. App. 12a-13a.

REASONS FOR GRANTING THE PETITION

This Court regularly decides issues of extraordinary consequence. This case is exceptional, even among those select cases that warrant the Court's review. The United States, acting through the Secretary of the Treasury, has asserted the protective

function privilege based on the Secret Service's professional judgment, derived from a century of experience in implementing the Act of Congress assigning it responsibility to protect the President, that the maintenance of strict confidentiality and a privilege against compelled disclosures are essential to prevent presidential assassinations. The court of appeals has rejected that considered judgment and declined to recognize the privilege in the context presented here, based on the court's own perspective of the Secret Service's needs. The court of appeals has fundamentally erred, and its decision portends grave consequences for the Secret Service's future ability to protect those in whom the Constitution singularly vests the Nation's executive power.

1. This case presents an issue of utmost national importance warranting review by this Court. The Independent Counsel urged this Court to issue a writ of certiorari even before the court of appeals rendered its judgment, observing that "[t]he claims of privilege in this case, while novel, are of paramount importance to the country." Petition for Writ of Certiorari in *United States* v. *Rubin*, No. 97-1942 (redacted version), at 9. He noted that "all readily agree that the physical safety of the President is a matter of urgent national and public concern." *Ibid.* Indeed, the Independent Counsel stated that "only this Court has the moral authority and public credibility to issue a final ruling on what the Secret Service plainly believes is a sensitive, life-or-death issue." *Id.* at 10.

The importance of this case arises not simply from its impact on the safety of the current and future Presidents, but also from its effect on the Nation's fundamental institutional interests. History leaves no doubt that the Nation will face future presidential

assassination attempts. The Secret Service stands between the Nation and the calamity of assassination. The court of appeals' refusal to recognize the protective function privilege will undermine the Secret Service's ability to step into the breach and protect the Nation from profound and predictable peril.

2. The court of appeals' decision is wrong. Drawing on this Court's decision in *Jaffee* v. *Redmond*, 518 U.S. 1 (1996), the court of appeals identified, in general terms, the correct analytical framework. The court erred, however, in its specific assessment of the need for the protective function privilege and of the efficacy of that privilege in preserving the confidential relationship between the President and those who are charged with his protection.

Rule 501 of the Federal Rules of Evidence provides that "the privilege of a witness * * * [or] government * * * shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." This Court set forth the governing principles of the common law in *Jaffee*. It stated that "we start with the primary assumption that there is a general duty to give what testimony one is capable of giving." 518 U.S. at 9 (quoting *United States* v. *Bryan*, 339 U.S. 323, 331 (1950)), but that "[e]xceptions from the general rule disfavoring testimonial privileges may be justified * * * by a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth,'" *ibid.* (quoting *Trammel* v. *United States*, 445 U.S. 40, 50 (1980)).

As the court of appeals recognized, protecting the President's life is "a public good of the utmost importance." Pet. App. 7a. The President, elected to office by the people of the Nation as a whole, is alone

vested with the "executive Power," U.S. Const. Art. II, § 1, is "Commander in Chief of the Army and Navy of the United States," U.S. Const. Art. II, § 2, Cl. 1, and is the "sole organ of the nation in its external relations." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (citation omitted). For those reasons, "[t]he Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence." *Watts* v. *United States*, 394 U.S. 705, 707 (1969) (per curiam). And for the same reasons, the assassination of a President causes grave injury to the Nation's democratic institutions and traditions, threatens its security and external relations, and visits profound trauma upon its people. Indeed, as the court of appeals recently observed, "few events debilitate the nation more than the assassination of a President." *Stigile* v. *Clinton*, 110 F.3d 801, 803-804 (D.C. Cir. 1997), cert. denied, 118 S. Ct. 1163 (1998); see also *Roy* v. *United States*, 416 F.2d 874, 877 (9th Cir. 1969) ("A President's death in office has worldwide repercussions and affects the security and future of the entire nation.").

The court of appeals correctly recognized that the absence of federal or state precedent has little relevance in light of "the novelty of the [Independent Counsel's] demand for testimony" and the absence of an instructive analogy to the Nation's unique and paramount interest in protecting the President from assassination. Pet. App. 6a; see Letter from Director John W. Magaw to Senator John F. Kerry, July 24, 1992, *reprinted in* C.A. Amicus Br. in Support of Secret Service, App. Tab 12 (informing Congress that "[n]o Secret Service employee has ever been required

to disclose information he or she may have overheard by virtue of a protective assignment").[2] The court therefore properly concluded that the question to be resolved is whether "recognition of the privilege in its proposed form will materially enhance presidential security by lessening any tendency of the President to 'push away' his protectors in situations where there is some risk to his safety." Pet. App. 6a. But the court of appeals incorrectly answered that question, erring in three basic respects.

a. First, the court improperly rejected, as mere "speculation," the Secret Service's professional judgment respecting the need for the privilege. Pet. App. 7a-8a. The Secret Service expressed that judgment through sworn affidavits of Director Merletti and two former Directors, which reflect nearly a century of the Service's experience in protecting numerous Presidents from assassination. The Service's judgment is based on the agency's accumulated expertise, including its careful study of assassination attempts and, collectively, the individual Directors' decades of personal experience in protecting Presidents. Pet. App. 39a, 41a (Merletti Decl. ¶¶ 3, 8); *id.* at 78a-79a (Bowron Decl. ¶¶ 2-3); *id.* at 86a-87a (Magaw Decl. ¶¶ 1-2). The Independent Counsel chose to introduce no evidence whatever to the contrary. In addition, all the living former special agents in charge of protecting the President from the Eisenhower Administration

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[2] As we explain in our brief in the court of appeals (at 31-32), Director Magaw wrote that letter in response to efforts by the Senate, in POW/MIA hearings, to require a Secret Service agent to testify regarding overheard conversations involving President Bush. The Senate committee ultimately voted not to subpoena the testimony of the Secret Service agent. S. Rep. No. 1, 103d Cong., 1st Sess. 32, 284 (1993).

through the Bush Administration jointly filed an amicus brief in the court of appeals independently endorsing the Service's judgment. See C.A. Amicus Br. in Support of the U.S. Secret Service.

The expert and unanimous views of the agency professionals whom Congress has charged with ensuring the President's protection are entitled to great weight in evaluating the need for the privilege. See *Jaffee*, 518 U.S. at 10-11 & n.9 (recognition of psychotherapist-patient privilege informed by the experience and judgment of the professionals who were trained and practiced in the area). Contrary to the court of appeals' suggestion, the Secret Service Directors' sworn statements are in no way analogous to appellate counsel's unsupported "speculation" in *Swidler & Berlin* v. *United States*, No. 97-1192 (June 25, 1998), slip op. 11. See Pet. App. 8a. The affidavits in this case rest on expert judgment grounded in the personal experience of agency officials charged by Congress with implementing an Act of Congress.

The court of appeals' lack of regard for the Secret Service's professional judgment is contrary to the approach of the courts in other, less weighty privilege contexts. For example, this Court has affirmed the judicial recognition of the *Machin* privilege for the government's military aircraft accident reports, see *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 802-803 (1984). This Court, and the D.C. Circuit in *Machin* itself, recognized that privilege in response to the professional judgment of federal aviation officials of the need for confidentiality in that context. See 465 U.S. at 796-797 & n.11; *Machin* v. *Zuckert*, 316 F.2d 336, 339 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963). There is even greater need for according deference to the Secret Service's professional judgment in light of the national security interests at stake. See, *e.g.*, *Department of the Navy* v. *Egan*, 484 U.S. 518, 527-530 (1988); *CIA* v. *Sims*, 471 U.S. 159, 170 (1985); *Ellsberg* v. *Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983), cert. denied, 465 U.S. 1038 (1984); *Sherrill* v. *Knight*, 569 F.2d 124, 130 (D.C. Cir. 1977); see also *Stigile* v. *Clinton*, 110 F.3d 801, 806 (D.C. Cir. 1997).

The court of appeals gave no reason for disregarding the Secret Service's views, stating only that it must "balance" the Directors' declarations and President Bush's letter endorsing their views against television interviews of Presidents Carter and Ford in which those former Presidents expressed their opinion that Secret Service personnel should be required to testify in a criminal case. See Pet. App. 8a (citing *Good Morning America* (ABC television broadcast, June 15, 1998); *Hardball with Chris Matthews* (CNBC television broadcast, June 4, 1998)). The court clearly erred in giving weight to those comments, which are not part of the record in this case. Indeed, neither President Carter nor President Ford questioned the Secret Service's considered professional judgment respecting presidential security needs, nor did they question whether some form of protective function privilege existed. Unlike President Bush, neither President Ford nor President Carter addressed the ultimate issue presented in this case, *i.e.*, the impact of compelling testimony on the Service's ongoing relationship of trust and confidence. To the contrary, each supported application of an absolute privilege in civil suits, and President Ford, whose views President Carter endorsed, appeared to support a qualified privilege, based on the court's "judgment as to what is a legitimate area" of inquiry, in criminal cases. See Transcript of *Hard-*

ball with Chris Matthews (CNBC television broadcast, June 4, 1998) (available on Lexis).

The court of appeals compounded its erroneous failure to give appropriate respect to the Secret Service's judgment by substituting its own assessment of the Secret Service's security needs. The court's views of those needs do not rest on professional judgment or any firsthand experience. To the contrary, they are inconsistent with the Directors' sworn affidavits. At bottom, the court's views simply reflect a remote judicial perspective on the relationship between the President and the Secret Service. It thus is the court of appeals' views that may be fairly described as "speculation."

For example, the court suggested that a privilege is unnecessary because "the President has a profound personal interest in being well protected" and "the President knows that effective protection depends upon proximity to his protectors." Pet. App. 8a. History shows, however, that past Presidents have not adequately assessed their security needs. *Id.* at 42a-43a (Merletti Decl. ¶¶ 10-11) (describing the Secret Service's conclusion that the assassinations of Presidents McKinley and Kennedy might have been avoided if those Presidents had permitted their security details to maintain closer proximity). Moreover, when safety depends on unremitting proximity, a slight or seemingly insignificant withdrawal may have fatal consequences. As Director Merletti emphasized, "even the most subtle (perhaps even unconscious) efforts to push away the protective envelope could have disastrous, even deadly, effects upon a President." Pet. App. 57a (Merletti Decl. ¶ 28).

The court of appeals also suggested that the Secret Service could sufficiently satisfy its security imperatives by educating Presidents about the importance of unremitting proximity. Pet. App. 8a-9a. As Director Merletti explained, however, the educational "process is already exceedingly difficult," and "it would be dramatically compounded if protectees were given reason to be concerned that protective personnel might be called upon to testify about what they were able to see or hear while in such close proximity to their protectees." Pet. App. 51a (Merletti Decl. ¶ 20). See also Dwight L. Tays, *Presidential Reaction to Security: A Longitudinal Study*, 10 Presidential Studies Quarterly 600 (1980) (describing the resistance of various Presidents to Secret Service protection). The court offered no basis to disregard that conclusion of the Secret Service, which alone has encountered the difficulties of protecting resistant Chief Executives and understands firsthand the additional security risks that those difficulties pose.

Finally, the court of appeals additionally questioned the need for the protective function privilege within the White House, suggesting that "the greatest danger to the President arises when he is in public, yet the privilege presumably would have its greatest effect when he is in the White House or in private meetings." Pet. App. 11a. The Secret Service's declarations recount, however, that close proximity is necessary in the White House as elsewhere. See Pet. App. 45a-47a (Merletti Decl. ¶ 15); *id.* at 81a (Bowron Decl. ¶ 7); *id.* at 88a (Magaw Decl. ¶¶ 5-6). For example, in 1994, an individual armed with a semi-automatic weapon opened fire at the White House, and within seconds, Secret Service protective personnel, employing the "cover and evacuate" protocol, were moving the President to safety, even as rounds were still being fired. Pet. App. 57a-58a (Merletti Decl. ¶

28). In another highly publicized example, a pilot intentionally directed a Cessna aircraft at the White House, making contact with the south wall of the Executive Mansion. See *ibid.* In yet another example, a protective officer died while thwarting an attempted assassination of President Truman while he was residing at Blair House. See *id.* at 45a-47a (Merletti Decl. ¶ 15).

b. The court of appeals also committed error in its consideration of the "efficacy" of the protective function privilege. Pet. App. 9a-12a. The court passed over the Secret Service's core submissions without heed to the protective function privilege's basic purpose. The Director of the Secret Service explained that the privilege facilitates Presidential security because it provides the President with reasonable assurance that he may maintain Secret Service agents in close proximity without fear that his personal confidences—including confidences about entirely innocent but private matters—will remain confidential. See Pet. App. 51a-57a (Merletti Decl. ¶¶ 21-25, 27). The court nevertheless rejected the privilege altogether on the basis of peripheral considerations concerning its precise contours and the procedures for its invocation. The considerations that the court of appeals identified do not undermine the President's reasonable expectations or cast doubt that the privilege would fulfill its fundamental objective.

For example, the court found it "anomalous" that the Secret Service did not require its personnel to sign confidentiality agreements as a condition of employment. Pet. App. 9a-10a. As the court had previously recognized, "[t]he Secret Service has a tradition and culture of maintaining the confidences

of its protectees." *Id.* at 4a. There have been instances of unauthorized disclosures, see *id.* at 11a, but the rarity of those instances during a century of Secret Service protection underscores the extent to which Presidents may justifiably rely on the Secret Service's discretion even in the absence of such agreements. See *id.* at 62a-63a (Bush letter). Indeed, it should come as little surprise that, when a government institution expects its officers to step unflinchingly in the path of an assassin's bullet, it need not demand that those officers sign written confidentiality agreements to secure a relationship of trust. See *id.* at 43a-44a, 53a (Merletti Decl. ¶¶ 12, 24).

The court also suggested that the protective function privilege would not give the President adequate assurances of confidentiality because the Service has indicated that it would not extend the privilege to a Secret Service agent's observation of a felony. Pet. App. 9a. That exception for contemporaneously recognized felonies strikes a reasonable accommodation between the agents' protective and law enforcement roles. The exception recognizes that the first responsibility of Secret Service agents assigned to protect the President is to ensure the President's safety, and that in doing so they must concentrate their attention on the contemporaneous activities of the President and those in his immediate vicinity. Those agents exercise law enforcement authority primarily as an adjunct of that responsibility and not, as in the case of traditional law enforcement officers, to engage in general police activities or conduct investigations into possible criminal activity.

More generally, the recognition that the privilege may be subject to exceptions is no reason to deny the privilege in toto. A privilege need not be limitless to

be efficacious. To the contrary, every privilege entails a balancing between the policy underlying the privilege and the "general duty to give what testimony one is capable of giving." *Jaffee*, 518 U.S. at 9 (quoting *United States* v. *Bryan*, 339 U.S. 323, 331 (1950)). As the Court indicated in *Jaffee*, a court may identify a privilege without determining its full scope or precise limitations. *Id.* at 18 ("it is neither necessary nor feasible to delineate [the] full contours [of the privilege] in a way that would 'govern all conceivable future questions in this area'" (citing *Upjohn Co.* v. *United States*, 449 U.S. 383, 386 (1981)).

The court additionally questioned the efficacy of the privilege because the Secretary of the Treasury, rather than the President, asserts it. Pet. App. 10a. The Secretary's role in asserting the privilege, however, simply manifests that Congress has charged the Secretary of the Treasury with the responsibility to supervise the Secret Service to protect the life and safety of the President. 18 U.S.C. 3056(a). The Secretary, acting in his official capacity, is the appropriate officer to invoke the privilege, which protects governmental rather than a personal interests. In that respect, the invocation and assertion of the privilege by the head of the relevant department parallels the procedure followed in asserting the state secrets privilege. See *United States* v. *Reynolds*, 345 U.S. 1, 7-8 (1953).

There is nothing anomalous in the Secretary's invoking the protective function privilege, on behalf of the United States, to protect institutional interests pertaining to the Office of the President, because Congress has by law assigned the Secretary the responsibility for protecting the President. Indeed, it is common for a privilege to be asserted by persons

other than the direct beneficiary of the privilege. For example, an attorney can invoke the attorney-client privilege, even though it exists for the benefit of a client. There is also nothing inefficacious in the expectations that result. The Secretary invokes the privilege in his official capacity to maintain confidentiality critical to the Secret Service's mission of protecting the President, and a President therefore can be confident that the Secretary will invoke the privilege in order to fulfill that mission.

The court also expressed concern that, because an incumbent President retains ultimate control over the assertion of the privilege within the Executive Branch, the prospect that a succeeding President might waive the privilege as to a former President undermines the expectation of confidentiality. Pet. App. 10a-11a. That objection is unfounded. As a theoretical matter, governmental privileges as a rule have always been subject potentially to waiver by successors in office, and that possibility has never been thought to render such privileges ineffective. More fundamentally, however, there is no realistic likelihood of such a waiver of the privilege asserted here. Three Secret Service Directors—supported by nine special agents in charge of protecting the President (see C.A. Amicus Br. in Support of U.S. Secret Service)—have affirmed the need for the protective function privilege, and there has never been an occasion of compelled testimony by Secret Service officers or agents on matters within the privilege. In light of that history, no future President would lightly reject the Secret Service's assessment of the ongoing institutional need to preserve every past President's expectation of confidentiality in order to

ensure a relationship of confidence and trust in the future.

c. The court of appeals also erred in its understanding of the proper judicial role in evaluating claims of privilege. Rule 501 of the Federal Rules of Evidence directs that the scope of privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501. The process that Rule 501 describes contemplates that the courts should recognize and tailor privileges in light of the specific policies at stake. See *Jaffee*, 518 U.S. at 18. Rather than making such an effort to tailor the privilege in response to specific issues it identified (which are largely peripheral to the privilege's core purpose of ensuring trust and confidence), the court rejected the claim of a privilege altogether and instead left the matter to Congress. Pet. App. 14a. That approach misconceives the courts' role under Rule 501, which was written with an understanding "of the difficulty inherent in compiling an exhaustive list of evidentiary privileges." *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 802 (1984).

The Court's decision in *Weber* provides an instructive example of the judiciary's role in evaluating claims of privilege. In the course of interpreting the Freedom of Information Act, 5 U.S.C. 552, the Court affirmed the existence of the *Machin* privilege, which prevents disclosure of government air crash investigation reports. See *Machin* v. *Zuckert*, 316 F.2d 336 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963). The Court noted that the privilege arose from practical needs learned through historical experience, 465 U.S. at 802, and that congressional inaction in the face of

that experience does not provide a basis for failing to recognize the privilege, *id.* at 803 n.25. The Court expressly stated:

> Congressional refusal to codify the *Machin* privilege hardly limits the power of courts to recognize the privilege under Rule 501. Indeed, Rule 501 was adopted precisely because Congress wished to leave privilege questions to the courts rather than attempt to codify them.

Id. at 804 n.25. That consideration takes on special significance in the case of the protective function privilege, which rests on the Secret Service's nonpartisan assessment of the fundamental security needs of the Executive Branch.[3]

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[3] Although the court of appeals suggested that the question of privilege should be left to Congress, it also suggested that a congressional predisposition against the privilege could be discerned from outlying legal authority. The court stated that Section 535(b) of Title 28, which directs department and agency heads to inform the Attorney General of information "relating to violations of title 18 involving Government officers and employees," 28 U.S.C. 535(b), "militates against recognition of the proposed privilege." Pet. App. 12a. The court offered that theory as little more than an afterthought, and for good reason. Section 535(b) sheds no meaningful light on the question of what evidentiary privileges may be asserted in litigation. There is no indication in the text or background of Section 535(b) that it was intended to have any effect on the privilege in question here. See, *e.g.*, H.R. Rep. No. 2622, 83d Cong., 2d Sess. 3 (1954) ("All this bill seeks to do is to insure, when necessary, that the Attorney General has the authority, upon the basis of information or complaint, to go into any agency to investigate alleged irregularities on the part of Government officers and employees."). The Attorney General, who is responsible for construing and applying Section 535(b), has concluded that the statutory provision does not prevent

As this Court indicated in *Jaffee*, Rule 501 not only "authorizes the recognition of new privileges on a case-by-case basis," but it also allows courts "to define the details of new privileges in a like manner." 518 U.S. at 18. In this case, the court rejected the Secret Service's formulation of the privilege based on discrete criticisms of that formulation without inquiring whether the privilege could be applied in a way that would answer the court's specific concerns. As the court acknowledged, "the physical safety of the President is a public good of the utmost importance." Pet. App. 7a. The court accordingly should have evaluated whether the "proposed privilege" (*ibid.*) might be further tailored to meet the court's specific—and ultimately quite narrow—objections. Its "all or nothing" approach to the question of privilege disserves the important public interests and statutory policies at stake in this case.

More generally, the court of appeals failed to appreciate that, to the extent that it harbored doubts about the existence or scope of the protective function privilege, those doubts should be resolved in favor of protecting the President from the danger of assassination. The privilege asserted here, like the spousal, attorney-client, and psychotherapist-patient privileges, is "rooted in the imperative need for confidence and trust." *Jaffee*, 518 U.S. at 10 (quoting *Trammel* v. *United States*, 445 U.S. 40, 51 (1980)). Secret Service agents maintain the President's confidences under a code of honor, enforced by distinguished tradition, in the same way that they place the President's life above their own. The courts cannot

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invocation of the protective function privilege, and her interpretation is entitled to deference.

reject the protective function privilege without disbelieving the Secret Service's informed professional judgment that its tradition of confidentiality, which the privilege secures, is essential for the Service to fulfill its protective mission. There is no basis in the record, or in reason and experience, to question the Secret Service's expert judgment on that matter. The stakes are simply too high to conclude that, while the Secret Service has made a strong showing (which is unrebutted on the record of the case), it must make that showing still more "clearly and convincingly" (Pet. App. 6a) to protect national interests of such extraordinary magnitude.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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